UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1002

NORTH CAROLINA UTILITIES COMMISSION
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

THE INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC.

THE NORTH AMERICAN TELEPHONE ASSOCIATION

THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

UTILITIES TELECOMMUNICATIONS COUNCIL

THE CENTRAL COMMITTEE ON TELECOMMUNICATIONS OF THE AMERICAN PETROLEUM INSTITUTE
Intervenors

No. 76-1152

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA
Respondents

COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC

NORTH AMERICAN TELEPHONE ASSOCIATION

Intervenors

and

ROLLINS PROTECTIVE SERVICE

Intervenor

No. 76-1292

RIXON, INC.

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA

Respondents

INDEPENDENT DATA COMMUNICATION MANUFACTURERS ASSOCIATION, INC.

Intervenor

No. 76-1415

AMERICAN TELEPHONE AND TELEGRAPH, ET AL

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA

Respondents

No. 76-1416

CONTINENTAL TELEPHONE CORPORATION

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA

Respondents

No. 76-1443

ROCHESTER TELEPHONE CORPORATION

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA

Respondents

No. 76-1467

UNITED SYSTEM SERVICE, INC., ET AL.

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA

Respondents

NORTH AMERICAN TELEPHONE ASSOCIATION

AERONAUTICAL RADIO, INC.

Intervenors

Order

FILED APRIL 29, 1976

I have been assigned the various motions to stay the First Report and Order, Adopted October 31, 1975, and the Second Report and Order, Adopted March 18, 1976, of the Federal Communications Commission, in FCC Docket No. 19528, pending judicial review. As all the other circuit judges in this circuit are disqualified and the other judges who will comprise the panel have not yet been designated, I consider this matter as a single circuit judge under FRAP 18, considering this an exceptional case due to the requirements of time, the orders which are subject to review becoming effective May 1, 1976, only days away, and additionally being on a weekend not a normal workday

for many people. I think the various motions for a stay should be acted on a day or so before May 1.

I am advised that requests for stays of the orders complained of have already been made to the FCC by some of the parties to this proceeding and have been denied.

In considering whether or not to grant a stay of the orders complained of pending review, I have considered the likelihood of prevailing on the merits of the review; whether or not those seeking the stay will suffer irreparable injury; the harm a stay would cause to the parties interested in the proceeding; and the public interest.

While one of the principal questions in these petitions for review, that of the jurisdiction of the FCC to enter the orders complained of, has been largely decided adversely to the position of the carriers in our opinion in *NCUC v. FCC*, Nos. 74-1220, et al (4th Cir., April 14, 1976) (NCUC I), thus making the likelihood of success on that question at best less than favorable, NCUC I did not resolve all of the questions which may be raised in this review, including, but not exclusively, the power of the FCC to require registration and approval of carrier-provided equipment; whether or not the economic consequences of the FCC action should have been taken into account prior to entering the orders complained of; whether or not it is proper to enter orders ostensibly based on lack of technical harm to the telephone system and separating the orders' economic effect, while at the same time requiring registration and approval of carrier-owned equipment only for its economic competitive effect; whether the economic benefits to some resulting from competition would result in economic detriment to the ordinary telephone subscriber so the effect of competition would be to pass along the cost of it to those whom it would not or might not benefit; what effect, if any, the orders of the FCC will have on the rates to the ordinary telephone sub-

scriber; as well as a multitude of others too numerous to mention. I mention these questions because they have been suggested by some of the various parties or have come to mind in reading the papers in these cases, and my mention of them should indicate no suggestion of issues or order of priority, or whether or not they may or should be raised, but only to show the multitude of problems which may be encountered in judicial review of the orders complained of. As I read the papers now before me, the resolution of many of the problems is far from certain.

While it is true that the moving parties here are largely telephone companies, and thus regulated utilities, and that any losses which may occur may not in the true sense be deemed irreparable in that the injury is not capable of restitution, it is equally true that the telephone subscribers throughout the country are going to have to pay for any costs which the FCC orders may occasion, one way or another. Nothing before me now shows that the orders complained of will not require a complete change in the rating structure of the various telephone companies throughout the United States which has existed with little variation for generations, and effecting such changes for every telephone subscriber in the United States cannot but cost countless millions. The cost of changing the rating structure is irretrievable and must be paid by the subscribers. Of like import is the cost of registration of carrier-provided equipment, whatever the actual cost may be. That cost will be paid by the subscribers and will be irretrievable. Should the petitioners prevail in this review, a changing back to the present system would double the irretrievable cost to the subscribers. The assertion by the FCC that it is not the carriers who will have to pay the cost, but rather their subscribers, seems to me, rather than being a reason not to grant the stay, a reason to grant it. I would apply the same reasoning to the argument of the FCC that it may now assert its primary jurisdiction and determine the economic wisdom of the assertion of the

jurisdiction later. It is the subscribers of the telephone companies who are going to have to pay for this experiment and if the experiment should not have been tried in the first place, the fact the subscribers are having to pay for it, whether it is wise or unwise, or legal or illegal, is another reason to stay the orders until their validity can be judicially ascertained.

The question of harm to those interested in the orders complained of necessarily concerns itself with the effect of maintaining the status quo, which is what those seeking the stay effectively ask for. The equipment manufacturers and manufacturing companies, as well as others, which are those largely opposing the stay, stand to lose anticipated profits from the sale of equipment to attach to the telephone system on the one hand and anticipated savings from the use of such equipment on the other. There is little or no loss to those opposing the stay other than the contemplated financial advantage to take effect in the future. Even assuming and discounting, arguendo, the telephone companies claims of ultimate financial disadvantage because they are regulated and, subject to approval by appropriate regulatory bodies, may adjust their rates to compensate, placing the orders into effect, as mentioned before, will result in at least a one-time loss of the cost of the registration program and the cost of placing into effect a new rating structure. These costs are immediate and will be necessarily required. The fact of such losses is neither contemplative nor speculative, while their amounts may be subject to some contention. Maintaining the status quo, then, will do little or no harm to those opposing the stay, other than in anticipated and speculative future savings and profits, while the effect on the present subscribers of the telephone companies, as well as on the companies themselves, is certain to occur, while the amount may be uncertain, and irretrievable unless balanced by anticipated future savings which are speculative at best.

It is apparent that the FCC has entered the orders complained of because it considers the public interest to be in the beneficial effects of competition. Historically, as well as legally, competition has meant lower prices. But public utilities are legally obligated to serve all at reasonable rates. That is their common denominator and includes telephone companies. What the effect of the orders complained of will be on the various telephone companies serving all their subscribers at reasonable rates is not divulged in the FCC orders. Assuming the advantages of competitive pricing which will be brought about by the FCC orders, if the result is passing these savings on to the telephone subscribers to pay for by way of increased rates, is the public interest served? Nothing before me indicates any consideration of the effect on the ordinary subscriber's telephone bill by the orders complained of. It is idle to say that the public is not interested in the amount paid for its telephone service. Assuming the FCC jurisdiction to issue the orders complained of under NCUC I, the question of where lies the public interest is as important an issue in this case as any other. And, while regulatory bodies may be to a large extent entrusted with the ascertaining of the public interest, their decisions may not be arbitrary or capricious, and their reasoning processes are subject to judicial review unless Congress has otherwise provided, which it has not done here. Whether or not the telephone bill to the ordinary telephone subscriber will be raised or lowered by the orders complained of, I consider to be a matter in the public interest. At the very least, whether the FCC should act before that matter is considered can only be said to be in the public interest.

I am thus of opinion, while the question of success on the merits of the case may be uncertain, consideration of irreparable injury, harm to those interested by maintaining the status quo, and the public interest, requires a stay to issue in these cases.

It is accordingly ADJUDGED AND ORDERED as follows:

I

The motions filed by the various petitioners to stay the First Report and Order, Adopted October 31, 1975, and the Second Report and Order, Adopted March 18, 1976, in FCC Docket No. 19528, are granted, and the FCC is stayed and enjoined, pending the petitions for review, from implementing any regulatory act which is the subject matter of the various petitions for review while the said petitions are pending in this court, without leave of court previously obtained.

Enter this 28th day of April, 1976.

/s/ H. E. WIDENER, JR.
H. E. Widener, Jr.
United States
Circuit Judge

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FOR THE FOURTH CIRCUIT

No. 76-1002

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FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION

THE INDEPENDENT DATA COMMUNICATIONS MANUFACTURERS ASSOCIATION, INC.

THE NORTH AMERICAN TELEPHONE ASSOCIATION

THE COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION

UTILITIES TELECOMMUNICATIONS COUNCIL

THE CENTRAL COMMITTEE ON TELECOMMUNICATIONS OF THE AMERICAN PETROLEUM INSTITUTE
Intervenors

No. 76-1152

UNITED STATES INDEPENDENT TELEPHONE ASSOCIATION
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents

COMPUTER AND BUSINESS EQUIPMENT MANUFACTURERS ASSOCIATION, INC.

NORTH AMERICAN TELEPHONE ASSOCIATION

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No. 76-1415

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Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA

Respondents

No. 76-1443

ROCHESTER TELEPHONE CORPORATION

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents

No. 76-1467

UNITED SYSTEM SERVICE, INC., ET AL

Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents

NORTH AMERICAN TELEPHONE ASSOCIATION

AERONAUTICAL RADIO, INC.

PHONE-MATE, INC.

Intervenors

No. 76-1502

PUBLIC UTILITIES COMMISSION OF OHIO

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA

Respondents

NASA CORPORATION

Intervenor

Filed June 16, 1976

It is ADJUDGED AND ORDERED as follows:

This court's order of April 28, 1976, staying the First Report and Order and Second Report and Order, in FCC Docket 19528, is vacated to the extent that it prohibited the First Report and Order from becoming effective as applied to customer-provided ancillary and data equipment. The stay of the first order is not vacated as it may apply to all extension telephones. This court's stay of the First Report and Order remains in effect as it pertains to carrier-provided ancillary and data equipment, and all other carrier-provided terminal equipment, including extension telephones, and the stay of the Second Report and Order remains wholly in effect.

With the concurrences of Judge Rives and Judge Tuttle.

/s/ H. E. WIDENER, JR.
H. E. Widener, Jr.
For the Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 76-1002, 76-1152, 76-1292, 76-1415, 76-1416, 76-1443, 76-1467, and 76-1502

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA
Respondents,

INTERNATIONAL BUSINESS MACHINES CORP., ET AL.,
Intervenors.

Order

FILED APRIL 28, 1977

We have considered the motions for a stay of the mandate in these cases and the opposition filed thereto by the Respondent, Federal Communications Commission.

In accordance with FRAP 41(b), issuance of the mandate in these cases, pending application to the Supreme Court for a writ of certiorari, shall be, and it hereby is, stayed for a period of thirty (30) days.

The stay order of June 16, 1976, partially staying the FCC orders involved herein, is to remain in full effect while this order staying issuance of the mandate is effective.

With the concurrences of Judge Rivers and Judge Tuttle.

/s/ H. E. WIDENER, JR.
H. E. Widener, Jr.
For the Court